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No. 82-898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES, *et al.*,

Appellants,

v.

LEON W. KNIGHT, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

As applied in the Minnesota community-colleges, is that State's Public Employment Labor Relations Act unconstitutional under the First and Fourteenth Amendments to the United States Constitution in so far as it denies nonmembers of the college-faculty's exclusive representative a right to participate through a system of "cumulative voting" in the selection of faculty-representatives to "meet-and-confer" committees?

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BRIEF FOR THE APPELLEES

Appellees Leon W. Knight, *et alia,* file this brief in support of the District Court's decision in No. 82-898. Herein, Appellees will demonstrate that, contrary to the assertions of Appellant Minnesota State Board for Community Colleges (Board), the "meet-and-confer" provisions of Minnesota's Public Employment Labor Relations Act (PELRA) are unconstitutional

as applied, even if the act's "meet-and-negotiate" provisions are valid.[1]

STATEMENT OF THE FACTS

Appellees accept the statement of facts in the Board's brief, with two clarifications. First, the Board correctly states that the District Court held the "new [election] procedure to select the faculty's meet and confer representative[s]" "not consistent with its * * * order [of 31 March 1982]" because "this procedure operated to totally exclude nonmembers of the MCCFA from membership on meet and confer committees".[2] The District Court justified its decision, however, not simply on the ultimate result that nonmembers of MCCFA were "totally excluded", but primarily on the requirements of the election procedure itself:

> Any faculty member * * * could nominate a faculty member, including himself or herself, to serve on a meet and confer committee. The MCCFA endorsed six candidates for each committee. All faculty persons were required to vote for six persons for each committee. If they failed to do so, their votes were voided.[3]

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[1] In a separate brief, Appellees respond to the contention of Appellant Minnesota Community College Faculty Association (MCCFA) in No. 82-977 that PELRA properly confers a monopolistic privilege on MCCFA to "meet and confer" with the Board, based on MCCFA's status as exclusive representative in the community colleges.

[2] Brief of Appellant Minnesota State Board for Community Colleges (B.) at 12.

[3] Joint Appendix at A-191.

Appellees Knight, Kjer, and Florin were candidates for election. All other candidates enjoyed MCCFA's endorsement. The effect of the "vote-for-six" rule, then, was to require Knight, Kjer, and Florin, as a condition of voting for themselves, also to vote for at least three of MCCFA's candidates.

Second, the Board incorrectly states that the District Court held that "the Constitution requires a voting procedure which affords a minority faction of the faculty a process which will insure that it can potentially elect a representative [to the 'meet-and-confer' committees] despite its minority status".[4] Actually, the most the District Court has said on the subject is that the Constitution requires the State to "afford every faculty member a fair opportunity to participate in the selection of governance representatives".[5] The District Court mandated a "cumulative-voting" procedure, not as a constitutional right in and of itself, but only as a practical remedy for Appellants' abridgement of Appellees' right to non-discriminatory participation in the "meet-and-confer" process, in the context of experience showing that a simple majoritarian election procedure cannot secure that right.

SUMMARY OF THE ARGUMENT

Although under no constitutional compulsion to create an official forum for communications between administrators and faculty-members in its community colleges, through PELRA Minnesota has established

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[4] B. at 13.

[5] Appendix to Jurisdictional Statement of Appellant Minnesota State Board for Community Colleges at A-23 (footnote omitted).

a statutory "meet-and-confer" process explicitly granting "professional employees" a right to select representatives for conferences with their employer concerning the services they provide to the public. As applied by MCCFA and the Board, however, the statute excludes from the "meet-and-confer" process all nonmembers of the exclusive representative, such as Appellees here, solely on the basis of their nonmembership. In the community colleges, this exclusion denies the State the benefit of the knowledge and expertise of such nonmember employees, in defiance of the statutory purpose; discriminates nonrationally among faculty-members; serves no discernible governmental interests of a "compelling" or "important" nature; and excessively infringes on the beliefs and associational interests of faculty-members who eschew membership in the exclusive representative.

The District Court correctly held that the "meet-and-confer" process is unconstitutional under the First and Fourteenth Amendments insofar as it bars participation by nonmembers of the exclusive representative, and properly mandated a "cumulative-voting" arrangement to remedy this discrimination. To question the District Court's decision entails accepting the self-evidently unconstitutional notion that a State may grant or withhold access to an official forum for communications between citizens and their government solely on the basis of a citizen's mere membership *vel non* in a private special-interest group.

ARGUMENT

Basically, the Board argues that the District Court's decision invalidating the process of electing representatives to "meet-and-confer" committees is wrong because: (i) Knight and the other faculty-members have no First-Amendment right to communicate with community-college administrators through the "meet-and-confer" process; (ii) even if First-Amendment interests were involved, limitation of access to that process to the exclusive representative is reasonable and serves "compelling" governmental interests; and (iii) in any event, the Constitution does not mandate "cumulative voting" in the context of electing faculty-representatives to "meet-and-confer" committees. The Board's argument, however, misses the point on all three particulars.

First, Knight and the other faculty-members do not claim a constitutional right under the First and Fourteenth Amendments to require the Board, or other college-administrators, to "meet and confer" with them. Rather, they assert that Minnesota may not constitutionally grant them, as "professional employees", a statutory right to "meet and confer", and then discriminatorily withdraw that right simply because they choose to remain nonmembers of the exclusive representative, MCCFA. That the "meet-and-confer" process discriminates against Knight and the others because of their beliefs and associational preferences adds insult to First-Amendment values to its blatant denial of equal protection of the laws. But, even if "meet and confer" implicated no First-Amendment interests at all, Knight's claim to nondiscriminatory treatment under the statute would be of constitutional dimension.

Second, the discrimination in the "meet-and-confer" process as applied in the community colleges is patently nonrational, in that it frustrates the very purpose the State asserts for creating the "meet-and-confer" forum, and bears no intelligible relationship either to MCCFA's status as exclusive representative or to its ability (if any) to provide community-college administrators with the accumulated knowledge and expertise of all faculty-members.

Third and last, the District Court's "cumulative-voting" rule is not the enunciation of some new constitutional "right" but merely a practical remedy designed to overcome invidious discrimination that has proven itself inherent in any simple majoritarian selection of "meet-and-confer" representatives in the colleges under the present circumstances.

Moreover, the Board's argument (if carried to its logical conclusion, as *Amicus Curiae* AFL-CIO carries it) would commit this Court to the shockingly *anti*-democratic notion that a State may jury-rig various official fora for communications between citizens and governmental agencies, and then arbitrarily grant or deny access thereto on the basis of the citizens' mere membership *vel non* in private special-interest groups—thereby enhancing or diminishing the political influence of individuals because of their personal beliefs and associations, as manifested in their organizational affiliations or independence.

I. Under the rubric "meet and confer", Minnesota's Public Employment Labor Relations Act creates an official forum for communications between college-administrators and all faculty-members.

Minnesota's Public Employment Labor Relations Act (PELRA)[6] defines "meet and confer" as the "exchange of views and concerns between employers and their respective employees",[7] and then states that:

> (1) The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas regarding all matters [other than statutorily defined "terms and conditions of employment"].
>
> (2) The professional employees shall select a representative to meet and confer with a representative or committee of the public employer on matters [other than "terms and conditions of employment"] relating to the service being provided to the public. * * *[8]

Thus, Minnesota has acknowledged that, in the context of the community colleges, conferences between

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[6] Minn. Stat. §§ 179.61 *et seq.*

[7] Minn. Stat. § 179.63, subd. 15.

[8] Minn. Stat. § 179.73. *See also* Minn. Stat. §§ 179.65, subd. 3; 179.66, subd. 3.

college-administrators and faculty-members are "necessary to the operation and quality of public services and * * * may assist [the administrators] in developing their policies". It has created, or (perhaps more accurately) *recognized,* a right for faculty-members to "meet and confer" with administrators.[9] And it has circumscribed the discretion of those administrators by requiring them to "meet and confer" with the faculty.[10] Or, as the District Court held, "the state has created a forum for the exchange of views * * *. The meet and confer process may not be a general public forum, but it is an important academic forum".[11]

To be sure, PELRA mandates that faculty-members "shall select a representative to meet and confer", rather than exercising that right individually or in *ad hoc* groups.[12] But, as the District Court noted and the Board concedes, "[t]his requirement is separate from the selection of an exclusive representative for purposes of mandatory bargaining";[13] and "[t]his representative is not the 'exclusive representative' ".[14]

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[9] Minn. Stat. § 179.65, subd. 3. As a general matter, "professional employees" had no right to "meet and confer" with their employers prior to enactment of PELRA. Faculty-members in institutions of higher education, however, enjoyed a tradition of self-governance which "meet and confer" merely codified. *See* the District Court's Findings of Fact, and Memorandum Opinion, in Appendix, *ante* note 5, at A-48 to A-49, and A-18.

[10] Minn. Stat. § 179.66, sub. 3.

[11] Appendix, *ante* note 5, at A-22 (footnote omitted).

[12] Minn. Stat. § 179.73, subd. 2.

[13] Appendix, *ante* note 5, at A-19 (footnote omitted).

[14] B. at 7.

In the ultimate analysis, then, exclusive representation is irrelevant to "meet and confer". For, as the District Court observed, "[r]egardless of whether [an exclusive] representative has been selected, PELRA requires some selection system for purposes of the meet and confer process. As applied to higher education, this effectively compels the establishment of a faculty governance system".[15]

In short, Knight's case does not depend on the assertions that the First and Fourteenth Amendments compel college-administrators to listen and speak to him,[16] or that those Amendments somehow inflexibly preserve the specific arrangements for faculty-governance which antedated PELRA.[17] Rather, it rests on PELRA's own creation of the "meet-and-confer" process as "an important academic forum" and "a faculty governance system".

II. By limiting participation in the "meet-and-confer" forum to designees of the exclusive representative, Minnesota's Public Employment Labor Relations Act discriminates among community-college faculty-members on the basis of their beliefs and associational preferences.

As applied in the community-colleges, however, "meet and confer" is not "an important academic forum" and "a faculty governance system" in fact for Knight and the other Appellees, because MCCFA and the Board have arbitrarily excluded them from

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[15] Appendix, *ante* note 5, at A-19.

[16] *Pace* B. at 17-19.

[17] *Pace* B. at 20-22, 26-27.

that "forum", solely on the basis of their nonmembership in MCCFA, and in patent defiance of statutory intent, public policy, community-college traditions, and precepts of academic freedom.

A. Nonmembers of the exclusive representative have been excluded from the "meet-and-confer" process solely because of their beliefs and associational preferences.

PELRA qualifies the "meet-and-confer" rights of "professional employees" such as Knight by mandating that

> [t]he employer shall not * * * meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit * * *, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is part of the employee's work assignment.[18]

Even if the statute requires community-college administrators to "meet and confer" "other than through the exclusive representative" (*e.g.*, with individuals) regarding "communication[s] * * * of advice or recommendations by [faculty-members]" concerning their "work assignment[s]", it explicitly channels all other "communication[s]", on every other "meet-and-confer" topic,[19] "through the exclu-

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[18] Minn. Stat. § 179.66, subd. 7.

[19] And on all "meet-and-negotiate" topics as well. *See* Minn. Stat. § 179.65, subd. 3.

sive representative".[20]

Nevertheless, this designation of the exclusive representative as the unique "meet-and-confer" intermediary between administrators and faculty does not necessarily compel exclusion of nonmembers of the representative from the "meet-and-confer" process. An exclusive representative solicitous of the interests of nonmembers could arrange for their participation in its selection of "meet-and-confer" spokesmen, on an equal basis with its own members. This, however, MCCFA has never done, and claims it need never do. Rather, as the Board concedes, "MCCFA's practice has been to select representatives for the faculty meet and confer committees from its own membership and it has not permitted nonmembers * * * to serve on any of the meet and confer committees".[21] And as the District Court held, "[t]his practice of systematically excluding nonmembers of the MCCFA obviously deprives such persons of a fair opportunity to participate in the meet and confer process".[22]

Admittedly, as the Board relates, Knight and other nonmembers of MCCFA can communicate individually and informally with college-administrators other than through "meet and confer".[23] But such com-

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[20] The proviso to *Minnesota Statutes* § 179.66, subd. 7, was enacted only on 22 March 1982. 1982 Minnesota Session Laws, ch. 568, § 15. The District Court rendered its decision respecting the validity of that subdivision as it existed prior to the amendment. As the discussion in the text points out, though, the proviso has no effect on the District Court's ruling.

[21] B. at 9.

[22] Appendix, *ante* note 5, at A-24.

[23] B. at 9-10.

munications constitute no real alternative to the "meet-and-confer" process because, as the District Court explained,

> [t]he meet and confer committees that presently operate are in fact the exclusive formal governance system for resolving issues outside the scope of mandatory bargaining. * * * The testimony of college administrators confirms that, although persons may still express their individual views outside the formal process, the "official" view of the faculty is the position adopted by the meet and confer committees. Thus, the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression. On any issue that has campus-wide impact, it is difficult to imagine that isolated individual views would have any weight when compared to the "official" view of the faculty. If some faculty members are excluded from participation and deliberation in the meet and confer process, they are effectively denied any meaningful expression on the issues resolved through that process.[24]

Moreover, MCCFA bases its discriminatory denial to Knight and other non-MCCFA faculty-members of "meaningful expression on the issues resolved through [the 'meet-and-confer'] process" solely on their beliefs and associational preferences: Participation in "meet and confer" depends on full membership in MCCFA, nothing less. Thus, as the District Court found,

> MCFFA's exclusive authority to select the ["meet-and-confer"] committee representative[s] * * * creates a chilling effect on the associational

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[24] Appendix, *ante* note 5, at A-19 to A-20.

> and speech interests of faculty members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining in or speaking out against the MCCFA, it seems self-evident that one's freedom not to join or to so speak is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one.[35]

Furthermore, MCCFA's discriminatory exclusion of Knight and other faculty-members from the "meet-and-confer" process is not "viewpoint neutral", as the Board pretends.[36] Rather, MCCFA explicitly complains that its "security" as the exclusive representative in PELRA's "meet-and-negotiate" scheme will be "threatened by an independent meet and confer team".[37] MCCFA banished Knight from the "meet-and-confer" committees, then, not to guarantee "neutral" points of view therein, but instead to preserve the subservience of those committees to its own peculiar ideology and orthodoxy.

That Knight and other nonmembers of MCCFA had an opportunity to vote on MCCFA's original selection as exclusive representative, or may have an opportunity at some distant point in the future to vote for its decertification from that position, does not mitigate the effects of MCCFA's present discrimi-

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[35] *Id.* at A-24.

[36] *Pace* B. at 28-29.

[37] Brief on the Merits of Appellant Labor Organizations at 39-40.

natory exclusion of them from the "meet-and-confer" process.[28] For, as the District Court explained, prior to PELRA, "all faculty members * * * had the right to vote for individual representatives that would deal with issues of college and faculty governance. All faculty members could also seek to serve in such roles". Now, however, "[t]hese rights are * * * completely lost unless one joins the MCCFA".[29] Designation of MCCFA as exclusive representative by their colleagues, therefore, deprived Knight and other nonmembers of that organization of the opportunity they enjoyed prior to PELRA to participate equally with all faculty-members in academic governance, of the opportunity the statute itself affords them in the absence of an exclusive representative, and even of the opportunity MCCFA could provide if it were not afraid to tolerate dissent from its policies. To say that this designation somehow secured Knight "a voice" in the "meet-and-confer" process, as does the Board, is to travesty the facts.[30]

B. Statutory intent, public policy, community-college traditions, and precepts of academic freedom all militate against discriminatory denial of any faculty-member's equal opportunity to participate in the "meet-and-confer" process.

PELRA does not ordain MCCFA's exclusion of nonmembers from "meet and confer". True, the statute commands that the Board "not * * * meet and confer with any employee or group of employees * * *

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[28] *Pace* B. at 36-37.

[29] Appendix, *ante* note 5, at A-28.

[30] B. at 36.

except through the exclusive representative".[21] But it nowhere orders MCCFA to foreclose all meaningful participation by nonmembers in "meet-and-confer" elections, committees, or other activities.

After all, the ultimate intent of PELRA's "meet-and-confer" provisions is to *provide for,* not to suppress, "discussions and the mutual exchange of ideas" between the Board and its "professional employees", because those employees "possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services".[22] Thus, the statute codifies the reality that "restraining teachers' expressions to [a school] board on matters involving the operations of the schools would seriously impair the board's ability to govern the district".[23] The Board's application of the statute, then, is schizophrenic: On the one hand, it implicitly admits what it cannot deny, that "meet[ing] and confer[ring]" with its "professional employees" is "*necessary* to the operation and quality of [the community colleges]". But, on the other hand, it explicitly insists that MCCFA may stifle some portion of this otherwise necessary input, simply because it emanates from nonmembers of that organization.

The Board's self-contradictory application of PELRA flies in the face of what the District Court described as the "[p]ublic policy support[ing] the tradition of participation by all faculty members" in

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[21] Minn. Stat. § 179.66, subd. 7.

[22] Minn. Stat. § 179.73, subd. 1.

[23] City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 175-76 (1976).

academic governance.[34] As that court noted, in general, "[t]he free and full exchange of ideas lies at the core of academia's contribution to our society".[35] And specifically, the court found that, "[t]raditionally, the subjects of meet and confer [in institutions of higher education] have been resolved through governance systems in which all faculty members have an opportunity to participate", and that "governance at community colleges [in Minnesota] prior to PELRA consisted of faculty senates and committees, selected through elections in which every faculty member was eligible to both vote and seek election".[36] The Board's quibble that "[t]here was no *distinct pattern* of faculty governance in the community colleges [before PELRA]" is beside the point.[37] Whether they fit a "distinct pattern" or not, *pre*-PELRA arrangements for academic governance did, in one way or another, involve *all* faculty-members *equally* in the selection-processes for the "faculty senates and committees", in keeping with long-standing traditions in such institutions; whereas, *post*-PELRA, MCCFA has imposed its own "distinct pattern" of intentional discrimination based on faculty-members' membership *vel non* in a private group—a "pattern" patently at odds with sound academic practice as it has evolved in this country.[38]

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[34] Appendix, *ante* note 5, at A-20.

[35] *Id.*

[36] *Id.*

[37] B. at 22 (emphasis supplied).

[38] *See* Brief *Amicus Curiae* of American Association of University Professors at 3-7.

Neither is the Board's contention credible that "[f]aculty members' academic freedom is secure" under MCCFA's discriminatory application of the "meet-and-confer" process.[39] "Academic freedom" imports the ability of teachers to be "exemplars of open-mindedness and free inquiry", and "leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' ".[40] How community-college faculty can become—or long remain—such "exemplars" and "leaders" when their own employer tells them that, to perform the very consultative services PELRA describes as "necessary to the operation and quality of public services",[41] they must first renounce "open-mindedness and free inquiry", eschew "wide exposure to [a] robust exchange of ideas", and acquiesce in the "authoritative selection" of truth by MCCFA, the Board does not explain. Rather, it glibly begs the question: "Faculty members' academic freedom is secure", the Board contends, because "[t]he only act they cannot do is formally meet and confer with their employer".[42] The issue here, however, is whether an aspect of academic freedom is the ability of each faculty-member to "meet and confer" with his employer, free from discrimination because of his adventitious personal associations.

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[39] B. at 20.

[40] Wieman v. Updegraff, 344 U.S. 183, 196 (1952); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[41] Minn. Stat. § 179.73, subd. 1.

[42] B. at 20.

In short, MCCFA's discriminatory application of PELRA's "meet-and-confer" provisions finds no justification in ultimate statutory intent, community-college traditions, or basic precepts of academic freedom. Rather, it reflects simply MCCFA's arrogant demand to monopolize the "meet-and-confer" forum for its own members, notwithstanding the detrimental effects of that monopolization on the ability of excluded faculty-members to perform their professional functions, and on the State's own interest in receiving the benefits of those persons' "knowledge, expertise, and dedication".[48]

III. Limiting participation in the "meet-and-confer" forum to designees of the exclusive representative thwarts the State's expressed purpose in establishing the forum, lacks a rational basis, serves no compelling governmental interest, and is not the least-restrictive alternative for regulating communications between college-administrators and faculty-members.

Thus, whether this Court views PELRA's "meet-and-confer" system either as the creation of a new, statutory right of access of public employees to their employers, or as the recognition (in the special context of higher education, at least) of the traditional right of faculty self-governance, with all its First-Amendment implications, the result is the same: Appellants have discriminatorily denied Knight and the other Appellees any participatory role in the "meet-and-confer" forum, solely on the basis of their non-membership in MCCFA. And this discrimination is

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[48] Minn. Stat. § 179.73, subd. 1.

repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it contravenes the State's explicitly articulated purpose in establishing "meet and confer", lacks a rational basis, serves no compelling public interest, and excessively infringes on Appellees' interests in academic freedom, and in freedom of speech, belief, and association.

A. The State's purpose in establishing the "meet-and-confer" process is to provide public employers with the benefit of the knowledge and expertise of *all* their professional employees.

Where, as here, fundamental liberties are involved, mere speculation or *ex post facto* rationalizations by Appellants' counsel as to Minnesota's possible interests in the "meet-and-confer" system lack any probative force.[46] Instead, this Court must consult only the purpose the State has articulated in PELRA as the justification for "meet and confer".[47] This purpose PELRA discloses in unequivocal language:

> The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange

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[46] *In re* Primus, 436 U.S. 412, 434 n.27 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789-90 (1978).

[47] *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 525 (1960); Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939).

of ideas regarding all matters not specified under ["terms and conditions of employment"].[46]

On its face, this provision repels any interpretation other than that the State seeks *equal* participation in "meet and confer" by *all* its "professional employees" (such as Knight and his colleagues). Especially in Minnesota's institutions of higher education, the involvement of *all* faculty-members is "necessary to the operation and quality of public services", because each instructor has *unique* "knowledge, expertise, and dedication" in his particular field of specialization, and because a "faculty" functions properly only when it combines *full* participation by *every* member. Indeed, in the special context of a college-faculty, where each member is selected precisely because of his own personal ability to contribute in a mutually complementary fashion to the total educational process, PELRA clearly contemplates "discussions and the mutual exchange of ideas" that maximize involvement by faculty-members as individual components of the educational system as a whole, not as members of some smaller group.

That PELRA requires that "professional employees shall select a representative to meet and confer with a representative or committee of the public employer",[47] or even that the statute designates the exclusive representatives as the "meet-and-confer" representative,[48] does not necessarily thwart or render inconsistent the legislature's expressed intent to in-

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[46] Minn. Stat. § 179.73, subd. 1.

[47] Minn. Stat. § 179.73, subd. 2.

[48] Minn. Stat. § 179.66, subd. 7.

volve all professional employees in "helpful and necessary" dialogue with their employers. For even an exclusive representative could arrange for selection of "meet-and-confer" committees through a non-discriminatory system in which all employees participated, and by which each employee enjoyed a fair opportunity to serve on the committees, regardless of his private associational preferences.[*]

B. Excluding nonmembers of the exclusive representative from the "meet-and-confer" process is a nonrational discrimination.

As applied by MCCFA and the Board, however, PELRA's "meet-and-confer" system was discriminatory. Indeed, Appellants arbitrarily limited participation in the "meet-and-confer" forum to members of MCCFA alone, patently frustrating the State's own purpose in creating that forum, without any rational basis in statutory language or intent.

PELRA declares that "[t]he legislature recognizes that professional employees possess knowledge, expertise, and dedication". Nowhere does the statute suggest that this "knowledge, expertise, and dedication" is a peculiar attribute of members of MCCFA (or any other private organization), or of those individuals whom MCCFA unilaterally selects to "meet and confer" with the Board. Indeed, if the legislature

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[*] Indeed, the District Court's various orders, ultimately providing for a "cumulative-voting" arrangement under the auspices of MCCFA, demonstrate a practical resolution of the merely apparent tension between the statutory requirements that all professional employees participate in "meet and confer", on the one hand, and that their representative for this purpose be the exclusive representative, on the other hand.

had entertained such a fantastic notion, it would have made participation in the community-college faculty itself contingent on membership in MCCFA. That it did not emphasizes the nonrationality of any argument that MCCFA should control entry into the "meet-and-confer" process because it has some special status. Participation in "meet and confer" in the colleges depends upon an individual faculty-member's own "knowledge, expertise, and dedication"—that is, his personal, professional status as an educator—not upon his adventitious allegiance *vel non* to a private, self-interested group without the intervention of which in faculty-governance the colleges functioned satisfactorily before the advent of PELRA.

Similarly, although PELRA does require that professional employees select a "representative" for purposes of "meet and confer", nowhere does the statute suggest that this representative must, should, or even may exclude from the process any employee who "possess[es] knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services". Indeed, if the legislature had intended to delegate such a discriminatory license, it would have specifically enjoined public employers to "meet and confer" with no employee who is not a member of the exclusive representative, rather than requiring "meet and confer" to function merely "*through* the exclusive representative".[**] This emphasizes the nonrationality of any argument that, to maintain its official position as exclusive representative, MCCFA must monopolize selection of "meet-and-confer" participants. MCCFA will retain its posi-

[**] Minn. Stat. § 179.66, subd. 7 (emphasis supplied).

tion as exclusive representative in the colleges no matter whom it selects, or allows to be selected by the entire faculty "through" its intermediation, as representatives in "meet and confer". The question, however, is whether it has any rational basis for demanding an *additional* license to discriminate among faculty-members in whatever selection-process it ultimately employs (or the courts order it to employ), solely because of those individuals' beliefs and associations. Such a basis is conspicuous by its absence.

C. No compelling state interest supports monopolistic access to the "meet-and-confer" process for the exclusive representative.

Its blatant nonrationality condemns Appellants' discriminatory application of PELRA's "meet-and-confer" provisions as unconstitutional under the Fourteenth Amendment. Even if some reason were forthcoming in its support, though, such discrimination would be unconstitutional anyway, because it serves no governmental interest sufficiently important to override the First-Amendment interests Knight and his colleagues have in speaking to the Board.

As the District Court explained,

> MCCFA's exclusive authority to select the ["meet-and-confer"] committee representative * * * inherently creates a chilling effect on the associational and speech interests of faculty-members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining or speaking out against the MCCFA,

> it seems self-evident that one's freedom not to join or to so speak out is seriously impaired. This risk of exclusion is inherent in the MCCFA's sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one.
>
> Because these effects infringe fundamental First Amendment guarantees, the MCCFA's exclusive selection authority can be upheld only if it is supported by compelling, legitimate state interests * * *. We find no such interests here."[11]

In this conclusion, Knight and the other faculty-members concur, for two reasons: (i) Neither this Court nor the District Court has ever held that *compelling* governmental interests support *any* form of exclusivity. And (ii) even if such interests supported exclusivity for purposes of PELRA's "meet-and-negotiate" scheme, they would not validate the significantly different "meet-and-confer" process.

1. As Appellees detail in their brief in No. 82-977, the judicial history of exclusive representation contains no approbation, only condemnation of the scheme as "a delegation of legislative power * * * unknown to our law", "utterly inconsistent" with the Constitution, and "intolerable".[12] Certainly no decision of this Court, or even of the District Court, has held that exclusive representation in private or public employment subserves compelling governmental interests. Indeed, far from itself finding any governmental interests "compelling" as far as ex-

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[11] Appendix, *ante* note 5, at A-24.

[12] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

clusive representation under PELRA is concerned, the District Court simply stated that "[t]he *Abood* decision is controlling here", as if that case had somehow settled the question of the constitutionality of exclusive representation in public employment.[53] *Abood,* however, had nothing to do with exclusive representation.[54] Moreover, in reaching its decision, the *Abood* plurality relied on mere "rational-basis" analysis (not the compelling-state-interest test), disqualifying *Abood* as a precedent in a situation such as this.[55]

2. The District Court was correct, nonetheless, in distinguishing exclusive representation in the context of PELRA's "meet-and-negotiate" scheme from exclusivity under the statute's quite different "meet-and-confer" system. First, the court noted how, "[i]n higher education, * * * faculty members have long enjoyed substantial formal and informal participation in college governance—present here in the form of faculty senates prior to PELRA", and recalled that "[s]uch a tradition of shared decisionmaking has not been generally true in other areas of employment".[56] Second, the court explained that, although the subject-matter of "meet and negotiate" is of a "largely economic, tangible nature", and although "it

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[53] Appendix, *ante* note 5, at A-12 (footnote omitted), *referring to* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[54] Brief for the Appellees in No. 82-977, at 33-37.

[55] *Compare* Abood, 431 U.S. at 217-26 (opinion of Stewart, J.), *with id.* at 245-54 (Powell, J., concurring in the judgment), and *with* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 & n.7 (1981) (opinion of Brennan, J.).

[56] Appendix, *ante* note 5, at A-25.

is thought that * * * the tangible benefits of bargaining flow to both members and nonmembers [of the exclusive representative] alike", "[t]he subjects of meet and confer * * * are generally intangible issues of governance", and "[i]t simply cannot be said that the benefits of conferring on such issues flow equally to persons who are excluded from conferring".[87] Third, the court denied that "[u]nion security will * * * be jeopardized by allowing nonmembers of the MCCFA to participate in selection of meet and confer representatives", emphasizing that "MCFFA remains the exclusive representative for all matters subject to the mandatory bargaining provisions [of PELRA]", and that "[n]o rival unions could simultaneously represent community college faculty".[88] Fourth and last, the court rejected the fear that the Board "would be subject to irreconcilable demands from rival unions", in as much as "meet and confer" requires no bargaining at all, and "the mandatory bargaining process [of 'meet and negotiate'] remains under the sole control of the MCCFA".[89]

Thus, the District Court pre-emptively exploded the basic complaint the Board now makes against its decision: namely, that that court's ruling somehow

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[87] *Id.* at A-25, A-26. Appellees, of course, reject as scientifically absurd the notion that all employees necessarily benefit at all, let alone equally, from collective bargaining. *See, e.g.*, Bradley, "Involuntary Participation in Unionism", *in Labor Unions and Public Policy* (Am. Enterprise Inst. 1958). But, if that thesis is rationally untenable even where such relatively objective matters as wages and hours are concerned, it can hardly apply to what the District Court properly described as "intangible issues".

[88] Appendix, *ante* note 5, at A-26.

[89] *Id.* at A-27.

subverts "[t]he governmental interest in meeting and conferring with a single employee representative".[60] This argument is obviously meritless. Under the District Court's "cumulative-voting" requirement, at most the internal composition of the "meet-and-confer" committee at each level of college-governance may change; but, just as before, only one such committee will exist at each level, none the less. For example, at the state level, the Board itself may not necessarily "meet and confer" with a committee representing the faculty that contains members of MCCFA only; but it will "meet and confer" with only one committee. This result satisfies the sole governmental interest the Board has asserted here. For, as the District Court noted, "[t]he state does not contend that it has a legitimate interest in excluding nonmembers of the MCCFA from serving on meet and confer committees", only that "the meet and confer process must be an orderly, systematic one", which interest "can be fully served without excluding nonmembers of the MCCFA".[61]

D. The least-restrictive alternative is to grant all faculty-members a fair opportunity to participate in the "meet-and-confer" process.

No one can rationally gainsay that, to some extent or other, the First-Amendment interests of Knight and his colleagues are at stake in this litigation. Self-evidently, MCCFA has demanded monopolistic access

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[60] B. at 33.

[61] Appendix, *ante* note 5, at A-24, A-25.

to the "meet-and-confer" process, not to guarantee the neutrality of that forum, but instead to assert its own peculiar orthodoxy as the "official voice" of every faculty-member, by stifling the expression of all dissenting opinions. This monopoly, of course, serves MCCFA's self-interest quite nicely. But it frustrates the State's purpose in enacting "meet and confer".[62] And it is hardly the means least-restrictive of Appellees' interests in freedom of speech and belief to achieve Minnesota's legitimate labor-relations goals.

As the District Court held, "[t]he ['meet-and-confer'] process would be no less orderly * * * if both members and nonmembers of the MCCFA participated".[63] Yet, under these conditions, Appellees' First-Amendment interests would receive significantly greater protection than under the discriminatory application of PELRA the District Court struck down. And, under the District Court's most recent "cumulative-voting" order, Appellees' interests would receive the greatest measure of protection, consistent with "orderly" administration of the "meet-and-confer" process. The District Court's latest ruling, then, is the least-restrictive alternative (at least in comparison to alternatives available heretofore): It serves the State's interest in structuring "meet and confer" around a single employee-committee at each level, while simultaneously guaranteeing as much as possible that all employees will enjoy a fair opportunity to participate in the selection of, or to function

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[62] *See ante*, pp. 19-21.

[63] Appendix, *ante* note 5, at A-25.

as, members of those committees, regardless of their nonmembership in MCCFA."

IV. The District Court's "cumulative-voting" requirement is a permissible means to guarantee nonmembers of the exclusive representative a nondiscriminatory opportunity to participate in the "meet-and-confer" process.

Unable to disprove that the District Court's "cumulative-voting" requirement is the least-restrictive alternative, the Board attacks it because other supposed alternatives are "democratic, reasonable and fully consistent with the district court's mandate of a fair opportunity to participate [in the 'meet-and-confer' process]".[64] First, asserts the Board, the "cumulative-voting" requirement is unnecessary because Knight and his colleagues "have the right to vote for their meet and confer representative when they elect their exclusive representative".[65] This simply misstates what actually transpired under PELRA as MCCFA and the Board applied it. True, Knight and the other faculty-members had an original right to vote for or against MCCFA as exclusive representative, and would presumably have a similar right to vote in any future election decertifying MCCFA and

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[64] Revealingly, Appellants do not even attempt to argue that MCCFA's original "meet-and-confer" monopoly was the least-restrictive alternative, let alone to provide the "clea[r] demonstration" of that fact necessary to their case. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 265 & n.29 (1963) (Brennan, J., concurring).

[65] B. at 37.

[66] *Id.*

designating some other organization to fill that role."[67] However, once MCCFA became the exclusive representative, *it and its members alone,* not Knight and other nonmembers, designated the specific individuals serving on the "meet-and-confer" committees. Having the right to vote "when they elect[ed] MCCFA as their exclusive representative" thus resulted in the nonmembers' *loss* of any "right to vote for their meet and confer representative"—and, under the Board's errant interpretation of PELRA, would result in such a loss whatever the identity of the exclusive representative. Moreover, Knight and his colleagues have had only one opportunity in over ten years to "elect their exclusive representative" (and may never have another such chance, unless MCCFA loses majority-support among the faculty). But the members of the various "meet-and-confer" committees are elected each year. If this is "democracy", it is the fraudulent variety Eastern European "people's republics" practice, not what our Constitution contemplates.

Second, says the Board, the "cumulative-voting" requirement is excessive, because Appellees' right to vote for "meet-and-confer" representatives was protected by Appellants' "revised meet and confer selection procedure".[68] Actually, the precise opposite occurred. As the District Court explained in its order mandating "cumulative voting", under Appellants' "revised" system "meet and confer"

> [c]ommittee members were selected through the following election procedure: The MCCFA con-

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[67] *See* Minn. Stat. § 179.67.

[68] B. at 39.

> vened a general meeting of faculty. Any faculty member present could nominate a faculty member, including himself * * *, to serve on a meet and confer committee. The MCCFA endorsed six candidates for each committee. *All faculty persons were required to vote for six persons for each committee. If they failed to do so, their votes were voided.* As a result of this election procedure, no non-MCCFA member was elected to be a meet and confer representative for this school year [1982-1983]. As long as MCCFA members continue to constitute a majority of the faculty persons voting and they vote for the union endorsed slate, no non-MCCFA member can ever be elected.[69]

Thus, the reality of Appellants' "revised" system was that, as a condition of voting for themselves, Knight, Kjer, and Florin (the three Appellees who were candidates for the "meet-and-confer" committees) were required to vote for candidates MCCFA endorsed. In order to exercise their own freedoms of speech, belief, and non-association, and to protect their academic freedom, then, Appellees had to forfeit those freedoms (at least in part) by supporting partizans of the very organization that has intentionally suppressed their liberties over the last decade, and used every means at its disposal to frustrate vindication of those freedoms in this litigation.[70] And, even so, under the present conditions in the community colleges, "no non-MCCFA member can ever be elected [to the 'meet-and-confer' committees]". Such an arrangement may constitute what the Board calls "a fully democratic election in which each faculty mem-

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[69] Joint Appendix at A-191 (emphasis supplied).

[70] *See post*, notes 93-94 & accompanying text.

ber could participate"[11] in the Eastern European slave-states, where the "party" selects the winning candidates in advance; but it is hardly "democracy" as people in this country have traditionally understood the term.

Third, argues the Board, the District Court's "cumulative-voting" requirement "erroneously results in the imposition of a constitutional mandate of proportional representation on meet and confer committees".[12] This mischaracterizes the situation. The "constitutional mandate" the District Court has enforced against Appellants is "the opportunity [for Knight and his colleagues] to participate meaningfully in the meet and confer process".[13] To be sure, as the Board notes, "[t]here is no precedent for" a "cumulative-voting" remedy to protect instructors' "opportunity to participate meaningfully" in dialogue with college-administrators. But this happenstance is irrelevant. If recourse to a "precedent" were necessary to strike down every novel infringement of fundamental constitutional liberties, the courts would be powerless to enforce the Constitution against imaginative violators. The Board forgets that the District Court did not impose "cumulative voting" as a constitutional right when it originally declared "meet and confer" invalid as applied. The court merely held that "[t]he present practice of having the MCCFA select all representatives on meet and confer committees is unconstitutional", and that PELRA's "meet-and-confer" provision "is valid as

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[11] B. at 39.

[12] *Id.* at 40.

[13] Joint Appendix at A-192.

applied to community colleges only if all faculty members have a fair opportunity both to select and serve as governance representatives".[74] The court adopted "cumulative voting" as a remedy for the violation of a constitutional right only after MCCFA and the Board had proven, through their actions, that they did not intend to afford "all faculty members * * * a fair opportunity both to select and serve as governance representatives"—but instead, through the "vote-for-six" requirement, sought to perpetuate MCCFA's unconstitutional monopoly over the "meet-and-confer" process.

Finally, the Board complains, "[t]he cumulative voting requirement imposes a substantial and continuing burden", because "[f]aculty may coalesce into formal or informal interest groups which are unrelated to a union animus"—all of which groups, the Board implies, would be entitled to some sort of proportional representation on the "meet-and-confer" committees.[75] This complaint disregards the basis of the District Court's orders: namely, that faculty-members needed protection for their First-Amendment liberties against MCCFA because MCCFA had abridged those liberties through oppressive exercise of its special statutory privilege of exclusive representation. The District Court eventually settled on "cumulative voting" as a remedy for unconstitutional discrimination in MCCFA's favor arising out of its special status. Obviously, this ruling can have no application whatsoever to "formal or informal in-

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[74] Appendix, *ante* note 5, at A-30.

[75] B. at 41.

terest groups *which are unrelated to a union animus*", because the ruling rests in the first instance on a dichotomy between members of MCCFA (who as members of the exclusive representative could participate meaningfully in "meet and confer" under Appellants' faulty interpretation of PELRA) and nonmembers of that organization (who could not so participate).

V. Sustaining the notion that a State may create a forum for communications between citizens and public officials, and then discriminatorily deny access to such a forum on the basis of a citizen's mere nonmembership in a private special-interest group, will license the States radically to transform traditional political structures in this country.

Ultimately, its patently empty make-weight arguments aside, the Board proffers a basic apology in support of MCCFA's monopolistic access to the "meet-and-confer" process: namely, that Minnesota may properly grant MCCFA that monopoly, because it has also granted MCCFA the monopolistic "special status" of exclusive representative.[16] This claim, of course, begs the question of the constitutionality of exclusive representation, for which no one has ever provided a rational defense.[17] But, even pretermitting the exclusive-representation issue, the Board's assertion implicates a daring thesis, made explicit by *Amicus Curiae* AFL-CIO, that government may condition a citizen's opportunity to participate in discussions of public policy with public officials upon

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[16] *Id.* at 29-32.

[17] *See* Brief for the Appellees in No. 82-977, at 15-24.

his membership in a particular private organization."[78] That this Court's sanction for such a notion would license the States—and, presumably, Congress as well—radically to restructure American political institutions along corporative-state lines emphasizes the importance of sustaining the District Court's decision on "meet and confer".

According to the AFL-CIO, "a right to associate with others for purposes of expressive activity inheres in the First Amendment"; but "the asserted right to refuse to associate is not entitled to the full measure of solicitude reserved for core First Amendment rights".[79] "[T]he First Amendment protection accorded the right to refrain from government compelled expression * * * may not pertain in circumstances in which affirmative speech would be fully protected", says the *Amicus,* because, "[b]y joining together, individuals are able to enhance the strength of their own voices, particularly as to governmental matters, and thereby to foster the free exchange of ideas the First Amendment is itself designed to foster"; whereas, "[a]n individual who refuses to express his * * * views, or to associate with others for the purpose of communicating views, is quite obviously not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote".[80] Therefore, the AFL-CIO concludes, in as much as "governmental action that

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[78] *See* Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Appellants (AC.) at 4.

[79] *Id.* at 7, 9 (footnote omitted).

[80] *Id.* at 10, 12.

impairs the ability of individuals to remain isolated from the expressive activity of others does not impair the 'marketplace of ideas' which the right of free association primarily fosters", such "action" is legitimate (if not actually compelled) under the First Amendment.[51] Indeed, asserts the *Amicus*, "the theory that the government may not have any dealings with organized groups of its citizens where unaffiliated individuals protest is unworthy of serious consideration".[52] What the AFL-CIO does not say is that the "dealings with organized groups of * * * citizens" it believes "the government may * * * have" involves those "organized groups" posturing as the authorized representatives of "unaffiliated individuals [who] protest", and that the "governmental action that impairs the ability of individuals to remain isolated from the expressive activity of others" which it advocates involves imposing "organized groups" as exclusive representatives of "unaffiliated individuals" as a condition of those individuals' receipt of governmental benefits.

This idea is nothing new. No, indeed. Rather, it is the basic tenet of the old fascist-syndicalist, or corporativistic, form of political organization. In the incarnation of that system made famous for its efficiency and fairness under the benevolent rule of *Il Duce* Benito Mussolini, the Italian government recognized "syndical organizations" with the right of representing all individuals within a given occupational group, including "unaffiliated individuals [who] protest", in relation to all political-economic ques-

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[51] *Id.* at 13.

[52] *Id.* at 15.

tions affecting the group."[63] This privilege "of existing as a separate legal entity and of representing all the members of a given occupational group whether they belong[ed] to the syndicate or not, [was] the fundamental prerogative of the Fascist syndical association".[64] Of course, today this selfsame privilege is the essence of MCCFA's status as exclusive representative under PELRA, too, and the obvious (albeit unidentified) model for *Amicus* AFL-CIO's "organized groups of * * * citizens" for the benefit of which government should "impai[r] the ability of individuals to remain isolated from * * * expressive activity".

Novel—or, perhaps more accurately put, shocking—is the AFL-CIO's claim that imposing on public employees (and, presumably, all other groups in society) the essential arrangements of fascist-syndicalism will actually promote "the free exchange of ideas the First Amendment is itself designed to foster"; whereas, those who oppose fascistic institutions and practices are actually "not enhancing the full discussion of matters of public concern which it is a primary purpose of the First Amendment to promote".[65] Apparently, the real author of the brief *amicus curiae* was George Orwell, and its real message the slogan of Oceania that "freedom is slavery" (or *vice versa*).

To sustain PELRA's "meet-and-confer" system as MCCFA and the Board have applied it, consistently with *Amicus* AFL-CIO's reasoning, this Court must acknowledge the power of government: (i) to recog-

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[63] *E.g.*, F. Pitigliani, *The Italian Corporative State* (1933), at 20-26, 32-33.

[64] W. Welk, *Fascist Economic Policy* (1930), at 76.

[65] AC. at 12.

nize private special-interest organizations as the exclusive representatives of occupational (and perhaps other) groups, including individuals within those groups who protest such forced representation; (ii) to deny nonmembers of the organizations within the occupational groups (and *a fortiori* the general public, too) any privilege to participate in the organizations' internal decision-making processes;[86] (iii) to privilege the organizations to require public officials to meet and confer regarding the development and implementation of public policies, with nonmembers of the organizations and the general public excluded from the discussions;[87] and (iv) to grant these private special-interest organizations tax exemptions or tax-supported subsidies, or other governmentally coerced payments for their lobbying and associated political action.[88] But, to acknowledge all these supposed governmental powers would be for this Court to ally itself—and the Constitution—fully with fascistic principles.[89] Such an alliance, no doubt, the AFL-CIO would welcome, as a legalistic rationalization for its on-going political program to restructure all of American industry along corporativistic lines.[90] And,

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[86] *Id.* at 15-16.

[87] *Id.* at 14-15.

[88] *Id.* at 16-17. *See* Minn. Stat. § 179.65, subd. 2 (power of exclusive representative to compel nonmembers to pay "fair-share fees").

[89] *See* F. Pitigliani, *ante* note 83, at 20-26.

[90] *See* R. Marshall, *et alia, An Economic Strategy for the 1980s: The Failure of Reagonomics and the Full Employment Alternative* (1982), at 44-47, *in* Appendix to Brief for the Appellees in No. 82-977.

equally without doubt, this Court's agreement with the *Amicus* that "syndical associations" such as MCCFA have such powers, even in the relatively confined context of PELRA's "meet-and-confer" process, the AFL-CIO would also welcome—for, just as under Italian fascism, "[t]he [legal] establishment of these [syndical] associations may be regarded as the first practical result on a large scale of the corporative policy".[21]

Appellees, of course, assume that no members of this Court would wittingly endorse corporativism as constitutionally legitimate, let alone as particularly favored under the First Amendment. But, because such an endorsement would constitute the true political-economic meaning of this Court's reversal of the District Court, no matter what rationale the Court's majority offered for its action, Appellees urge each member of the Court to focus on what is really at stake in the seemingly minor "meet-and-confer" issue. It is not simply whether Knight and his colleagues will enjoy a meaningful opportunity for dialogue with college-administrators concerning the performance of their duties as instructors, although that opportunity is important to them as individuals, and to all of American higher education. Instead, it is whether the nation's political and economic processes will remain open and pluralistic free markets of both ideas and goods, or whether fascistic arrangements will close those markets to all but the leaders of politically powerful special-interest organizations, operating in collusion with pliant politicians and administrators to the detriment of the public interest, as all monopolists always do.

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[21] F. Pitigliani, *ante* note 83, at xii-xiii.

VI. The District Court's award of costs is reasonable, in light of that Court's opportunity to review the record firsthand.

Finally, the Board trivializes this case by seeking a reduction of costs the District Court awarded Appellees on the "meet-and-confer" issue.[92] It hardly behooves the Board, let alone MCCFA, however, to blather about the District Court's supposed "abuse of discretion" in its award of costs, in a case which abounds with false testimony given under oath, suppression of evidence, and purported "findings of fact" categorically at odds with the record—none of which abuses either the District Court, or other courts, have bothered to address, let alone correct. And surely, if this Court was too busy or too insouciant to concern itself with the District Court's refusal to investigate and punish a massive conspiracy to falsify, conceal, and distort evidence,[93] or with the District Court's own fabrication of "findings of fact" in the face of overwhelming and unchallenged evidence to the contrary,[94] it should have no time or inclination now to dissect the District Court's mere apportionment of costs.

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[92] B. at 41-44.

[93] *See* Petitioners' Appendices, *In re Knight*, No. 79-1910 (8th Cir., filed 24 October 1979), *motion for leave to file petition for mandamus denied*, 444 U.S. 821 (1979), *petition for mandamus denied*, 614 F.2d 1162 (8th Cir. 1980), *cert. denied*, 449 U.S. 823 (1980).

[94] *See* Jurisdictional Statement in No. 82-901 (filed 1 December 1982), at 27-29, *and* Appendix to Jurisdictional Statement in No. 82-901, at 151-437, *judgment aff'd without opinion*, —— U.S. ——, 103 S. Ct. 1493.

CONCLUSION

This Court should affirm the decision of the District Court on the "meet-and-confer" issue, including its order mandating "cumulative voting" for "meet-and-confer" representatives.

Respectfully submitted,

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